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ANIMATION THEME PARK SDN BHD v. ZJ ADVISORY SDN BHD

HIGH COURT MALAYA, IPOH
ANSELM CHARLES FERNANDIS JC
[ORIGINATING SUMMONS NO: AA-24NCVC-150-04-2017]
B 30 OCTOBER 2017

COMPANY LAW: *Winding up – Petition – Statutory notice of demand – Claim for success fee – 'Without prejudice' letter seeking reduction of amount – Whether letter merely seeking for reduction of amount or questioned defendant's entitlement* C *to amount claimed – Whether letter seeking reduction of amount admissible in court – Whether plaintiff's application for Fortuna injunction ought to be allowed*

EVIDENCE: *Without prejudice communications – Admissibility – Correspondence between parties to settle outstanding amount – Whether correspondence subjected* D *to 'without prejudice' rule*

The plaintiff was a joint venture company set up to promote a tourism project in the form of an animation theme park at Bandar Meru Raya, Ipoh, Perak. The defendant was appointed as an independent financial advisor to secure finances for the said animation project. In return, the defendant was to be E paid a 'success fee' at the rate of two per cent of the aggregate finance amount secured by the plaintiff. The defendants were not the only ones appointed by the plaintiff to secure finances. The plaintiff had also appointed Affin Investment Bank Berhad ('Affin Investment') as Mandated Lead Arranger, Facility Agent and Security Agent to secure a syndicated loan of F RM280,000,000 to finance the cost of the said theme park. Shortly thereafter, a loan of RM280,000,000 was made available to the plaintiff by a group of financial institutions including Affin Investment. The defendant subsequently sent an invoice for the sum of RM2,756,000 to the plaintiff. The plaintiff had prior to that paid RM3,000,000 to the defendant for works done by the defendant and there was no attempt by the plaintiff to pay the G sum stated in the invoice. Further, by an email, the defendant asserted that there remain a debt owing to the defendant by the plaintiff and threated to exercise the defendant's rights for legal recourse. Then, on 1 December 2016 the plaintiff sent an email ('letter dated 1 December 2016') to the defendant seeking a reduction of the amount. Upon receiving the letter dated H 1 December 2016 the defendant replied by way of an email dated 5 December 2016 stating 'without prejudice and without taking away our rights to full entitlement of the amount due' … 'we are open to discuss with you side on the what would be the best solution to resolve this outstanding amount'. Subsequently, the defendant issued to the plaintiff a statutory notice I of demand pursuant to s. 465(1)(e) read together with s. 466 of the Companies Act 2016 ('the Notice'). The Notice was dated 27 March 2017

but was not based on any court judgment. The defendant thereafter issued a letter confirming the defendant's position that the plaintiff has purportedly admitted to the defendant's claim by the plaintiff letter dated 1 December 2016. On receipt of the Notice, the plaintiff applied for a *Fortuna* injunction *vide* encl. 1 to stop the defendant from presenting a winding up petition against the plaintiff. The plaintiff also sought a declaration that the letter dated 1 December 2016 sent by them to the defendant was a privileged document because it was made on a without prejudice basis. The plaintiffs contended, *inter alia*, that (i) the parties were in the mist of negotiating with a view to settle the dispute regarding the payment of the balance so called 'success fee', that being so, the letter was privileged and inadmissible; and (ii) the syndicated loan was obtained mainly due to the efforts of Affin Investment and that the plaintiff was only liable to pay the defendant for previous work done. The issues that arose for determination were (i) whether the letter dated 1 December 2016 was a privileged communication; and (ii) whether the plaintiff was entitled to a *Fortuna* injunction.

Held (allowing plaintiff's claim with costs):

(1) The principles concerning privileged communication under the 'without prejudice' rule is well set out in the case of *Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors*, namely (i) some individuals must be in dispute and that dispute led them to negotiate with one another; and (ii) the communication between the parties must contain suggested terms that would finally lead to the settlement of the dispute. It was an undeniable fact that Affin Investment was involved in the procurement of the syndicated loan. In fact, they played the key role in securing the loan. Further, the correspondences before and leading up to the letter dated 1 December 2016 revealed that there was a *bona fide* dispute as to the eligibility of the defendant to receive the balance fees. It was not a question of 'merely' a request for reduction in the amount owed. In the context of the letter, the reduction of the fees was because the plaintiff was questioning the defendant's entitlement for the balance success fees and whether the defendants were entitled to more than what had already been given to them. (paras 34, 39, 40 & 42)

(2) The sequence of correspondences *via* emails and letters showed that not only was there a dispute but they were trying to reach a compromise as to the dispute. The tone of the correspondences would indicate one of compromise and one geared towards a settlement. Therefore, the letter dated 1 December 2016, considered together with the sequence of events would be a privileged communication under the 'without prejudice' rule. It was therefore inadmissible as a piece of evidence. (paras 48 & 49)

(3) The finding that the letter dated 1 December 2016 letter was inadmissible because it was privileged communication, would be detrimental to any winding up petition contemplated by the defendant against the plaintiff. The petition would have no chance of success as there would be no evidence to show the plaintiff was unable to pay its debts. The statutory demand was not based on any judgment from the court. (para 56)

(4) The principles in *Fortuna v. The Deputy Commissioner of Taxation* (the *Fortuna* case) are (i) the presentation of the petition might result in irreparable damage to the company and the proposed petition has no chance of success; or (ii) a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might result in irreparable damage to the company rather than by a suitable alternative procedure or cause of action. On the facts of the case, presentation of a winding up petition would cause irreparable damage to the plaintiff. The theme park would be opened and operational soon as evinced from the plaintiffs email. In such circumstances, a winding up petition would spell disaster to the plaintiff. (paras 52 & 59)

(5) The dispute could have been brought by way of a writ action and ventilated therein rather than winding up proceedings. The presentation of a winding up petition could therefore be construed as an improper use of the process and the plaintiff should be freed from the improper pressure imposed by the defendant by this court granting this injunction. (paras 59 & 60)

Case(s) referred to:

Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors [1999] 2 CLJ 749 HC ***(refd)***
Fortuna v. The Deputy Commissioner of Taxation [1978] VR 83 ***(refd)***
Hadi Hassan v. Suria Records Sdn Bhd & Ors [2004] 8 CLJ 225 HC ***(refd)***
Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd [2011] 1 LNS 1763 CA ***(refd)***
Malayan Banking Bhd v. Foo See Moi [1981] 1 LNS 95 FC ***(refd)***
Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***
Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***
Re Sunshine Securities (Pte) Ltd.; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver And Liquidator Of Mosbert Acceptance Ltd [1977] 1 LNS 109 HC ***(refd)***
Wong Nget Thau & Anor v. Tay Choo Foo [1994] 4 CLJ 617 HC ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 465(1)(e), 466
Evidence Act 1950, s. 23

Other source(s) referred to:

Halsbury's Laws of Malaysia, vol 21, 2006 Reissue, p 214

For the plaintiff - Danial Rahman Yang Razali & Norazali Nordin; M/s Maxwell Kenion Cowdy & Jones
For the defendant - Wong Rhen Yen & Gary Ng (PDK); M/s Dennis Nik & Wong

Reported by Sandra Gabriel

JUDGMENT

Anselm Charles Fernandis JC:

Introduction

[1] The plaintiff received a statutory notice of demand pursuant to s. 465(1)(e) read together with s. 466 of the Companies Act 2016 (the notice). The notice was dated 27 March 2017. Such a notice will be sent as a prelude to a winding up petition.

[2] On receipt of the notice, the plaintiff applied for what is commonly termed a "*Fortuna* injunction" to stop the defendant from presenting a winding-up petition against the plaintiff. The application is in encl. 1. Prior to this, an interim injunction was granted pending the full hearing of this matter. The plaintiff also seeks a declaration that a letter dated 1 December 2016 sent by them to the defendant is a privileged document. This was because it was made on a without prejudice basis. The plaintiff had during the course of this proceeding abandoned prayer (d) encl. 1.

[3] At the outset, I note that the notice was not based on any court judgment. This, however, does not prevent the notice being presented. In *Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763 the Court of Appeal in making its observations on this very issue stated:

> Before we proceed to answer those questions, we should perhaps say that "a creditor is not required to obtain a judgment before serving a statutory demand …" (*The Law of Company Liquidation* 4th edn. by Andrew R Keay at p. 83) and "whether or not judgment had been obtained, an unpaid creditor is, as a general rule, entitled to a winding-up order against a company which is insolvent" (*The Law of Company Liquidation* 4th edn. by Andrew R Keay at p. 91). Where there is no judgment, it is not uncommon for companies to argue that the debt is disputed. But "in order to oppose a winding-up petition, the respondent must raise a *bona fide* dispute in both a subjective and objective sense. It must be honestly believed to exist and must be based on substantial or reasonable grounds. *BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd* [2001] 1 CLJ 591; [2001] 1 MLJ 356" (Chan & Koh on *Malaysian Company Law* 2nd edn. at para. 22.145).

Background Facts

[4] The plaintiff and the defendant are body corporate.

[5] Plaintiff is a joint venture company set up to promote a tourism project in the form of an animation theme park at Bandar Meru Raya, Ipoh Perak.

[6] The defendant was appointed as an independent financial advisor by a letter of appointment dated 17 July 2013 (exh. "RO3" of plaintiff's affidavit in support).

[7] The defendant's scope of work pursuant to cl. 1.2 of the letter of appointment was to secure finances for the said animation project and *inter alia*, were as follows:

i. Preparation of material and information that required to be furnished to the financier or any potential financier;

ii. To validate financial estimates of the said animation theme park project;

iii. Liaising with financier or potential financier and executing all other necessary tasks in assisting to secure finance for the said animation theme park project;

iv. To revise and comment, negotiate and settle the main terms and conditions for the proposed finance; and

v. To revise and comment and partake in negotiation of the transaction documents for the suggested finances.

[8] The services of the defendant however came with a price. Pursuant to cl. 2.2 of the said letter of appointment; the defendant is to be paid what was termed as a "success fee" at the rate of two percent of the aggregate finance amount secured by the plaintiff.

[9] The defendants were not the only ones appointed by the plaintiff to secure finances. The plaintiff had also, by letter dated 18 February 2014, appointed Affin Investment Bank Berhad (Affin Investment) as "mandated lead arranger, facility agent and security agent" to secure a syndicated loan of RM280,000,000 to finance the cost of the said theme park. An extract from the letter of appointment will perhaps give an insight as to the scope of work Affin Investment is supposed to perform for the plaintiff. The first three paragraphs of the said letter are worded as such:

> We refer to the various meetings held between the representatives of AFFIN Investment Bank Berhad ("Affin Investment"), En Rozahan Osman of Perak Corporation Berhad, and Mr Darren McLEan and En Ramelle Ramli of ATP, with regard to the above matter.
>
> Pursuant to the meetings, we understand that the Company is planning to raise a total debt financing of up to RM280.0 million (with a Letter of Credit ("LC")/Bank Guarantee ("BG") sub-limit of RM50.0 million) under a syndicated term loan facility (which may include Islamic financing) to part finance the development of the Animation Theme Park, located in Bandar Meru Raya, Ipoh, Perak ("the Project").
>
> In view of the above, we are pleased to offer our services to the Company to act as the Mandated Lead Arranger, Facility Agent and Security Agent for the Proposed syndication upon the terms and conditions stipulated herein ("Mandate Letter").

[10] For the services rendered by Affin Investment to the plaintiff, an "arrangement fee" of "1.20% flat of the actual amount closed" is to be paid to Affin Investment (exh. "RO4" of plaintiff's affidavit in support).

[11] Shortly thereafter, by a "facilities agreement" dated 10 July 2014, a loan of RM280,000,000 was made available to the plaintiff by a group of financial institutions including Affin Investment". (exh. "RO5" of plaintiff's affidavit in support).

[12] On 11 September 2014, the plaintiff issued an email addressed to Affin Investment informing Affin of the plaintiff's request for a drawdown from the loan. (exh. "PKH5" at p. 16 of the defendant's affidavit in reply). This was followed by a more detailed letter regarding the same matter to Affin Investment also dated 11 September 2014.

[13] On 27 July 2016, the defendant had sent an invoice for the sum of RM2,756,000 (inclusive of GST) to the plaintiff. The invoice stated that the payment was for:

> … the Final Success Fee payable for the advisory services rendered for the Proposed Project Including successful completion of the Proposed Financing of RM280 million.

[14] It was undisputed that the plaintiff had prior to 23 November 2016 paid RM3,000,000 to the defendant for works done by the defendant for the plaintiff.

[15] There was no attempt by the plaintiff to pay the sum stated in the invoice. Upon inquiries by the defendant as to the non-payment of the invoice sum, the plaintiff replied by email, on 15 November 2016 the following to the defendant:

> I have had conversations with various people here to find out why this invoice is still outstanding. There are various versions of the reason but one common thing is that there are several communications between ZJ and ATP previously on this matter.
>
> I'm trying to get the information and correspondences. Appreciate if you can assist.

[16] By a letter 23 November 2016, defendant demanded the plaintiff to pay sum of RM2,756,000 which the defendant claim is the balance success fee due to them (exh. "RO6" of the plaintiff's affidavit in support). This was to be paid within seven days of the letter.

[17] Further, by an email also dated 23 November 2016 the defendant asserted that there remains a debt owing to the defendant by the plaintiff and threatening to exercise the defendant's rights for legal recourse (the email is part of exh. "PKH8" at p. 36 of defendant's affidavit in reply (2)). The salient part of the email dated 23 November 2016 reads:

A In summary, whatever debts that are due and payable should be paid by the debtor and ZJ Advisory shall reserve all rights including legal recourse to pursue its claims.

[18] Alarm bells were ringing and on 1 December 2016 the plaintiff sent an email to the defendant (exh. "PKH8" defendant's affidavit in reply (2) B p. 36). The plaintiff stated in the email the following:

Finally I have been able to get the information from various parties on the situation.

Attached is a letter appealing and requesting for a reduction in the fees for your consideration and if possible, for us to negotiate to an amount C acceptable to both parties.

[19] The plaintiff's email was of course referring to the letter of the same date from the defendant to the plaintiff (exh. "RO7" of the plaintiff's affidavit in support). The relevant portions of the letter need to be reproduced here for ease of reference and clarity.

D

Your letter dated 23 November 2016 refers.

We have gathered the documents and information related to this matter and we wish to seek your kind consideration for a reduction of the amount.

E We make this request as ATP had incurred and paid 1.2% financing fee (RM3.36 million) to Affin Investment Bank Berhad, the lead arranger of the Syndicated Term Loan. The involvement of Affin Investment Bank Berhad in the arranging the financing package was key in the success of the financing exercise that justifies the financing fee paid to them.

F In addition, the delay in construction of the park has also increased the total development cost and pushed back the cash inflow forecasted earlier hence, additional financing from the shareholders are required.

We seek your kind consideration to our request and look forward to discuss with you on this matter with a view of arriving at an acceptable G solution for both parties.

Please contact me at 012-2869164 if you have any queries.

[20] This letter was referred to in the defendant's letter headed "letter of demand for outstanding final success fee due to ZJ Advisory Sdn Bhd dated 4 April 2017 to the plaintiff (exh. "RO11" of the plaintiff's affidavit in H support).

[21] Upon receiving the letter dated 1 December 2016 the defendant replied by way of email dated 5 December 2016 (exh. "PKH 8" defendant's affidavit in reply (2) p. 35). There, the defendant stated the following pertinent statement:

I

> Without prejudice and without taking away our rights to full entitlement of the amount due and payable by ATP, we are open to discuss with your side on the what would be the best solution to resolve this outstanding amount.

[22] The parties had also agreed to a meeting as stated in the email of 5 December 2016. The meeting was held on 8 December 2016 at the defendant's office. Arising from the meeting, there were more exchanges of emails between the parties. On 11 December 2016 the defendant had sent to the plaintiff a chronology of events together with a billing summary (exh. "PKH8" defendant's affidavit in reply (2) p. 35). These documents seem to have been discussed during the aforesaid meeting. This led to further queries by the plaintiff with a view of the defendant "substantiating" their involvement in certain matters arising from the documents mentioned. The defendant replied curtly that "your company would have records (for audit purposes)" and "our scope of work can be found in our engagement letter".

[23] Subsequently, the defendant *via* their solicitor issued to the plaintiff the notice (under s. 465(1)(e) read together with s. 466, Companies Act 2016) dated 27 March 2017 purportedly over a debt. (see exh. "RO9" of the plaintiff's affidavit in support).

[24] The plaintiff disputed the notice. (see exh. "RO10" of plaintiff's affidavit in support).

[25] The defendant's solicitor thereafter issued a letter dated 4 April 2017 in reply to the plaintiff's letter dated 29 March 2017 confirming the defendant's position that the plaintiff has purportedly admitted to the defendant's claim by the plaintiff letter dated 1 December 2016 (see exh. "RO11"). This was how the defendant worded it:

> From your letter dated 1.12.2016 to our client, you did not dispute the works and services rendered nor the fees charged. You **merely** appealed for a reduction of the final fees. (emphasis added)

A copy of the defendant's solicitor's letter dated 4 April 2017 was also forwarded to the plaintiff's solicitor on 12 April 2017.

[26] By a letter dated 7 April 2017 the plaintiff's solicitor demanded the retraction of the notice which was refused by the defendant *via* the said letter dated 12 April 2017 (plaintiff's affidavit in support, the letter dated 7 April 2017 and 12 April 2017 marked collectively as exh. "RO12").

The Plaintiff's Case

[27] The plaintiff contends that letter dated 1 December 2016 sent by the plaintiff to the defendant was a "without prejudice" letter. The parties were in the midst of negotiating with a view to settle the dispute regarding the payment of the balance so-called "success fee". That being so, the letter was privileged and inadmissible.

[28] The syndicated loan was obtained mainly due to the efforts of Affin Investment. Affin Investment played "a key role" in the obtaining of this loan. They had also paid RM3,360,000 to Affin Investment for their part in securing the syndicated loan for the project.

[29] The plaintiff was only liable to pay the defendant for previous work done. Such were the reasons for the previous payment that was made to the defendant. The defendant would have to prove that they were responsible for the plaintiff obtaining the syndicated loan.

The Defendant's Case

[30] The defendant contends that they had successfully obtained for the plaintiff the syndicated loan of RM280,000,000. They were therefore entitled to the sum of RM5,756,000 (inclusive of GST) as "success fees" for the procurement of the loan. This was in accordance with the letter of appointment dated 17 July 2013.

[31] It is undisputed that a sum of RM3,000,000 had already been paid by the plaintiff to the defendant. RM2,756,000 was still owed to the defendant by the plaintiff.

[32] The defendant states that there was no dispute as to the amount owed. There was never negotiation for a settlement. The plaintiff's letter dated 1 December 2016 to the defendant never denied that the plaintiff owed the defendant RM2,756,000. It merely stated that the plaintiff wanted a reduction.

Issues To Be Considered

[33] i) Is the letter dated 1 December 2016 a privileged communication?

ii) Whether the plaintiff was entitled to a "*Fortuna* injunction" in the light of (i) and the facts of this case.

The First Issue, The Without Prejudice Communication

[34] The principles concerning privileged communication under the "without prejudice" rule is well set out in the case of *Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors* [1999] 2 CLJ 749. There, Abdul Malik Ishak J (as he then was) stated the two preconditions as to the applicability of a "without prejudice" communication. His Lordship stated:

> Two common features must be present before this privileged communication would be activated:
>
> (a) some individuals must be in dispute and that dispute led them to negotiate with one another; and
>
> (b) the communication between the parties must contain suggested terms that would finally lead to the settlement of the dispute.

[35] Section 23 of the Evidence Act 1950 is relevant here. It is the codification of the common law rule on "without prejudice" communication. The section reads:

> **Admissions in civil cases when relevant**
>
> In civil cases no admission is relevant if it is made, either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.
>
> Explanation – Nothing in this section shall be taken to exempt any advocate from giving evidence of any matter of which he may be compelled to give evidence under section 126.

[36] As to the applicability of common law to s. 23, the commentary in *Halsbury's Laws of Malaysia,* vol. 21, 2006 Reissue at p. 214 opined as follows:

> Section 23 merely states a broad principle and does not specify detailed rules. For this, we must look to English law. Sir James Fitzjames Stephen, who drafted the Indian Evidence Act 1872, (the direct parent of our Evidence Act 1950, originally enacted in 1893), also wrote a Digest of the Law of Evidence ... and his art. 20 is, with immaterial differences, identical to our Evidence Act 1950 s. 23. In effect therefore, the English common law on 'without prejudice' statements in civil cases is part of our law.

[37] The effect of any communication being covered by this rule is to render such communication inadmissible. This proposition is succinctly stated in the case of *Malayan Banking Bhd v. Foo See Moi* [1981] 1 LNS 95; [1981] 2 MLJ 17 as follows:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement. Per Chang Min Tat FJ.

Further, as long as there was a dispute and there were genuine negotiations geared towards a settlement, the communication could be classified as without prejudice communication despite the fact that the "without prejudice" label was not used by any of the parties. Such "without prejudice" communication can also be inferred from the surrounding circumstances of the case.

[38] An example of the situation where the communication was regarded as privileged even though the "without prejudice" label was not attached to the communication is the case of *Dusun Desaru Sdn Bhd (supra)* where it was stressed:

A As I said exhs. A15, A16 and A17 of encl. 4 do not carry the "without prejudice" labels, yet the shield of privilege would apply to them. Lord Griffiths in *Rush & Tompkins Ltd v. Greater London Council (supra)* aptly put it as follows (see p. 1299 of the report):

> The 'without prejudice' rule applies to exclude all negotiations
B genuinely aimed at settlement whether oral or in writing from being given in evidence. **A competent solicitor** will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. (emphasis added)

C However, the application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission
D or partial admission.

[39] As to whether there was a *bona fide* dispute in the present case it is an undeniable fact that Affin Investment was involved in the procurement of the syndicated loan. In fact, they played the "key role" in securing the loan.

[40] The correspondences before and leading up to the 1 December 2016
E letter reveal that there was a *bona fide* dispute as to the eligibility of the defendant to receive the balance fees. To my mind, this is not a question of "merely" a request for reduction in the amount owed. If that were so, the plaintiff would not have mentioned the fact that Affin Investment had played a major role in the securing of the syndicated loan in the letter. Neither
F would they have mentioned that RM3,360,000 had been paid to Affin Investment for their involvement in securing the loan.

[41] It would have been perhaps desirable if the letter dated 1 December 2016 had been composed in a more legalistic style, expressly stating the words "without prejudice" and that there was a dispute to the fees payable.
G On perusing the letter, however, I am reminded of the fact that the letter was not written by a lawyer or to use the words in the *Dusun Desaru*'s case "a competent solicitor" but by the plaintiff's chief financial officer. There was also no evidence to indicate that the plaintiff had legal advice at that point of time. The letter did mention that there was an "increase in the
H development cost" but to my mind, this was something ancillary. The main trust was Affin Investment's role in "arranging the financing package".

[42] It must also be emphasised that the letter must be read as a whole. The message that the said letter was endeavouring to project was that there was another entity namely Affin Investment, had played a crucial role in securing
I finances of RM280,000,000 for the plaintiff. In the context of the letter, the

reduction of the fees was because the plaintiff was questioning the defendant's entitlement for the balance success fees. Were the defendants entitled to more than what had already been given to them?

[43] It was therefore of no surprise that the defendant stated in their reply dated 5 December 2016 the following:

> Without prejudice and without taking away our rights to full entitlement of the amount due and payable by ATP, we are open to discuss with your side on the what would be the best solution to resolve this outstanding amount.

[44] What seems obvious is that the defendant themselves had regarded their communication as privileged and "without prejudice and without taking away" their rights to full entitlement to the fees. In this aspect, the law is clear that this privilege can also cover subsequent as well as previous correspondences. This proposition was put forward in *Dusun Desaru Sdn Bhd & Anor (supra)* where it was stated:

> Even a subsequent letter may, *ex post facto*, declare an earlier one to have been made 'without prejudice' (*Peacock v. Harper* [1887] 6 WN 109). On the other end of the scale, there will be a situation where the first of a series of letters is marked 'without prejudice' and the rest of the series will be regarded by implication to be of the same character (*Paddock v. Forrester* [1842] 3 Man & G 903 and *Re Harris* [1875] 32 LT 417). This would be the natural inference to draw unless there is a clear break in the chain of correspondence to show that the privilege is not claimed (*India Rubber, Gutta Percha and Telegraph Works Co Ltd v. Chapman* [1926] 20 BWCC 184).

[45] This proposition of law was reverberated in the case of *Hadi Hassan v. Suria Records Sdn Bhd & Ors* [2004] 8 CLJ 225:

> This privilege is unique. It covers not only the particular letter in question but also extends to all the subsequent parts of the same correspondence on both sides even though they are not expressed to be ' without prejudice' (*Paddock v. Forrester; Re Harris, ex parte Harris* [1875] 44 LJ Bey 33; *Peacock v. Harper* [1877] 26 WR 109; *Oliver v. Nautilus Steam Shipping Co* [1903] 2 KB 639, CA; and *India Rubber, Gutta Percha, and Telegraph Works Co Ltd v. Chapman* [1926] 20 BWCC 184, CA).

[46] Prior to the 1 December 2016 letter, the plaintiff was already indicating that there was a dispute regarding the success payment to the defendant. Their email dated 15 November 2016 remarked that there were "various versions" as to why the invoice sent earlier had not been paid (para. 14 above).

[47] It is imperative that the surrounding facts and circumstances be taken into account in order to determine whether the parties were actually and sincerely seeking a compromise to the dispute. Where a compromise or

settlement is being sorted to the dispute the "without prejudice" rule would then apply to the communication between the parties. (see *Wong Nget Thau & Anor v. Tay Choo Foo* [1994] 4 CLJ 617; [1994] 3 MLJ 723).

[48] Further, the sequence of correspondences *via* emails and letters will show that not only was there a dispute but they were trying to reach a compromise as to the dispute. The tone of the correspondences would indicate one of compromise and one geared towards a settlement. Phases and terms used in the correspondences include:

> There are various versions of the reason but one common thing is that there **are several communications between ZJ and ATP previously on this matter** (email dated 15.11.16 by Plaintiff to Defendant).
>
> ... to discuss with you on this matter with a view of arriving at an **acceptable solution for both parties.** (letter by Plaintiff to Defendant dated 1.12.16).
>
> ...**we are open to discuss with your** side on what would be the **best solution to resolve** this outstanding amount. (email by Defendant to Plaintiff dated 5.12.16) (emphasis added)

as well as the meeting agreed between both parties on 8 December 2016 and matters arising therefrom are factors which this court had considered in determining that there were efforts by the parties to settle the dispute.

[49] That being the case, it is this court's finding that the letter dated 1 December 2016 considered together with the sequence of events would be a privileged communication under the "without prejudice" rule. It is therefore inadmissible as a piece of evidence.

[50] Now that the letter is found to be inadmissible, it behoves this court to consider the consequences of such finding on the present application.

The Second Issue, The *Fortuna* Injunction

[51] The two branches of the principle applicable that guide courts in the grant of such an injunction are well set out in the judgment of Ramly Ali JCA (as His Lordship then was) in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947. In elucidating these principles involve, His Lordship stated:

> An application for an injunction to restrain an intended winding-up petition against a company is known as a "*Fortuna* Injunction", taking its name from the case of *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83. In that case the court laid down the basis on which a court acts to restrain the presentation of a winding-up petition and the two principles that guide courts in the grant of an injunction to that effect. (see also: *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 (Court of Appeals).

The first principle laid down in that case in that an injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. In order to succeed in getting injunction under this principle, the applicant must satisfy both limbs of the principle ie:

(i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and

(ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company.

(see: *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v. Amanda* [1964] 1 Ch 240, [1963] 2 All ER 940; and *Bryanston Finance Ltd v. De Vries (No 2)* [1976] 2 WLR 41, [1976] 1 All ER 25)

This principle is not applicable to the present case. The respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed. Therefore whether or not it causes irreparable damage is of no consequence. Thus the injunction applied for by the appellant in the present case, cannot be granted by court under this principle.

The second principle established in the *Fortuna* case is that an injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.

This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is no consequence whether or not it will cause irreparable damage to the company, if presented. A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case also cannot be granted under this principle.

[52] The principles in the *Fortuna* case can therefore be summarised as follows:

(a) the presentation of the petition might result in irreparable damage to the company and the proposed petition has no chance of success; or

(b) a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might result in irreparable damage to the company rather than by a suitable alternative procedure or cause of action.

[53] It is clear that the two branches of the principle in *Fortuna v. The Deputy Commissioner of Taxation* [1978] VR 83 (the *Fortuna* case) are disjunctive. There can thus be situations where "both the first and the second branches of the principle apply" (see *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295).

[54] With the above legal aspects concerning a *Fortuna* injunction in mind, I now discuss their applicability to the case at hand.

[55] The defendant laid much prominence and importance to the plaintiff's letter dated 1 December 2016. It was the defendant's assertion that this letter pointed toward the fact that the plaintiff was admitting or to put in another way "did not dispute" the fact that the balance "success fees" were owed to the defendants. The letter was thus germane to the notice.

[56] This court's finding that the 1 December 2016 letter is inadmissible because it was privileged communication would therefore be detrimental to any winding up petition contemplated by the defendant against the plaintiff. The petition would have no chance of success as there would be no evidence to show the plaintiff was unable to pay its debts. As stated earlier, the statutory demand was not based on any judgment from the court. In the *Fortuna* case, McGarvie J explained the scope of this branch as follows:

> The first branch applies to cases where the petitioner is incapable of success as a matter of law or through absence of supporting evidence. Where the petitioner is not entitled to present a petition or where the ground alleged is not a ground which can find a winding up order, the petition is incapable of success as a matter of law. If there is no **sufficient evidence** to establish an otherwise sufficient ground, the petition is incapable of success for that reason. Thus the first branch applies where the proposed petition cannot succeed. (emphasis added)

[57] Now, with regard to the second branch in the *Fortuna* case *(supra)*. This court is of the view that there was a *bona fide* dispute as discussed earlier in this judgment. The existence of Affin Investment and the key role it played in obtaining the syndicated loan was not specifically disputed. These facts translate to whether the defendant was entitled to the balance of the "success fee". There lies the dispute.

[58] McGarvie J went further on to explain the second branch of the principle in the *Fortuna* case in the following manner:

> The second branch applies to cases where there is *a more suitable alternative means of resolving the dispute* involved in a disputed claim against the company. They are not necessarily cases in which, as a matter of law or through absence of evidence, there is an inherent incapacity of success. They may be cases where the petitioner is entitled to present the petition, the ground is sufficient in law and there is evidence to support the ground. *They are cases, though, where, due to the availability of the more suitable*

alternative remedy, the court hearing the petition would in the circumstances, in the exercise of its discretion, decline to make a winding up order, at least while the circumstances remain as they are at the time of the application for an injunction. (emphasis added)

[59] It is this court's considered view that by presenting a winding up petition would cause irreparable damage to the plaintiff. The dispute could have been brought by way of a writ action and ventilated therein rather than winding up proceedings. It was within the defendant's knowledge that huge loans were obtained from various financial institutions to finance the plaintiff's theme park. The theme park would be opened and operational soon as evinced from the plaintiff's email. Further, there is evidence that the plaintiff was a viable concern. In such circumstances, a winding-up petition would spell disaster to the plaintiff.

[60] The presentation of a winding up petition could therefore be construed as an improper use of the process and the plaintiff should be freed from the improper pressure imposed by the defendant by this court granting this injunction.

[61] Quite apart from what had been discussed above, this court also take note that the facts of this case are distinguishable from cases such as *Re Sunshine Securities (Pte) Ltd.; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver And Liquidator Of Mosbert Acceptance Ltd* [1977] 1 LNS 109; [1978] 1 MLJ 57 and *Lafarge Concrete (M) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763; [2012] 6 MLJ 817 where the court held that there was an "unequivocal admission of debt" by the company. In this present case, the request for a "reduction" in the circumstances stated in the letter of 1 December 2016, in particular the reference of the role of Affin Investment in obtaining the syndicated loan cannot be ignored in the whole factual matrix of this case.

Conclusion

[62] To conclude, it is the finding of this court that the letter dated 1 December 2016 is inadmissible because it is privileged communication. In the circumstances, there is no chance as to the success of a winding-up petition.

[63] This court is also of the view that there is a *bona fide* dispute as to the sum total that is to be paid to the defendant. As there is a dispute, an action by way of a winding-up petition such as the present one would be considered oppressive. The continuance of a winding up petition would do irreparable damage to the plaintiff. Prayers (b) and (c) of encl. 1 are therefore allowed. I award cost of RM5,000 to the plaintiff.